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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1850.

JOHN F. DONAHUE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Brief in Opposition to Petition for Certiorari.

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Statement of Proceedings and Facts.

Respondent accepts petitioner's statement of proceedings and facts. Additional facts will be stated in Argument.

Argument.

1. THERE WAS NO CONSTITUTIONAL ERROR IN THE FAILURE TO DISCLOSE THE GRAND JURY TESTIMONY OF GREGORY.

Petitioner's first contention is that the grand jury testimony of one Gregory was exculpatory evidence unconstitutionally suppressed by the prosecutor. Fernald testified at the trial that he stole some heaters and delivered them to the petitioner, and that Gregory participated in the theft

and delivery (Tr. 80-82, 85, 88).^{*} Gregory was not called as a trial witness for either side, but in his grand jury testimony he denied that he participated in the theft (Petition, Appendix D at 45, 46). It is Gregory's denial of guilt that is said to be exculpatory because it might have been used to impeach Fernald.

The constitutional standards for reversal because of suppressed exculpatory evidence have been reviewed by this Court as recently as June of this year. *United States v. Agurs*, 44 U.S.L.W. 5013 (1976). The present case is not a situation where the prosecution used perjured testimony or knew or should have known of the perjury. Nor is this a case where a specific request for relevant evidence was ignored. Here, when the defense moved to inspect the grand jury minutes, the prosecutor submitted the problem to the court (R. 18, court's notation thereon). The prosecutor thereafter fully complied with the judge's order to disclose the grand jury minutes of only those witnesses whom it intended to class as trial witnesses (*Commonwealth v. Donahue*, Mass. Adv. Sh. (1976) 793, 808-809, 344 N.E. 2d 886, 893, Petition, Appendix A at 32; see R. 18). It follows that no constitutional error was committed unless the omitted evidence of Gregory's denial "creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, *supra*, 44 U.S.L.W. at 5017.

Like the misidentification of the elusive "Slick" in *Moore v. Illinois*, 408 U.S. 786 (1972), Gregory's predictable denial of participation in the theft is at best an insignificant factor. Fernald gave detailed testimony of the theft of the heaters and the delivery of twelve of them to the petitioner's home address (Tr. 80-82, 85, 88). The heaters were un-

^{*} References to the transcript of evidence will be designated by "Tr." References to the volume of documents entitled "Defendant's Claim of Appeal" also known as the "Record," will be designated by "R."

loaded into the petitioner's garage while the petitioner stood on the porch about 15-30 feet away (Tr. 87). This occurred after the petitioner came out of the house with Allen and pointed toward the garage (Tr. 86, 94-95). Petitioner admitted to the state police and to the jury that he saw the heaters in his garage, although he claimed he did not know how they got there or how they were removed (Tr. 172-173, 228, 233-235).

Following the jury's guilty finding, the trial judge twice considered Gregory's self-serving grand jury denial, and twice ruled that the evidence was not exculpatory. Additionally, the Massachusetts Supreme Judicial Court correctly concluded under the *Moore* test that it is far from clear that the defendant would gain any exculpatory advantage from Gregory's claim of innocence even by way of impeachment of Fernald. No reasonable doubt about petitioner's guilt existed on the evidence presented, and no new reasonable doubt could possibly be raised by a cohort's predictable denial of guilt.

One final point cannot be overlooked. It is clear that the defendant knew before trial that Fernald named Gregory as a participant. *Commonwealth v. Donahue*, Mass. Adv. Sh. (1976) at 809, 344 N.E. 2d at 893, Petition, Appendix A at 32. Yet the defense failed to call Gregory as a trial witness, an informed decision which can only be viewed as deliberate trial strategy. In view of these circumstances, there can be no genuine basis for a claim of suppressed exculpatory evidence and a lack of fairness to the defendant.

2. THERE WAS NO CONSTITUTIONAL ERROR WITH RESPECT TO THE DISCLOSURE OF PROMISES, REWARDS OR INDUCEMENTS.

The non-disclosure of information is again raised in Point 2 of the petition as a basis for claiming constitutional error. Specifically, the petitioner asserts that there was a

failure by the prosecutor to disclose: (a) a promise by police officer Rafferty to keep the witness Fernald "on the street," and (b) a statement by the prosecutor to Fernald that he could be sentenced for up to 17 years and that he would be crazy to take a prison term. The defense was in fact fully aware of the substance of these statements. Fernald was vigorously cross-examined about both statements. Upon cross-examination, Fernald admitted the fact of the Rafferty statement concerning a favorable bail recommendation on May 22, 1974 (R. 35-36, Tr. 103-104; see also Tr. 176 where defense counsel shows another witness a written statement of Officer Rafferty concerning bail for Fernald). Fernald also admitted upon cross-examination that the prosecutor made a statement about the possibility of a 17 year sentence (Tr. 130, 159; see Tr. 144-145). In view of the fact that Fernald did not deny the statements, there is no possible issue concerning perjured testimony in this case. Cf. *Giglio v. United States*, 405 U.S. 150 (1972).

Additionally, the defense and the jury knew at the time of the trial that Fernald had been guaranteed transactional immunity by the Supreme Judicial Court (Tr. 63-71, 125-127), perhaps the best possible inducement in this case. It follows that additional earlier promises concerning bail or other pending charges could not create a reasonable doubt about guilt that did not otherwise exist. *United States v. Agurs*, *supra*, 44 U.S.L.W. at 5017.

3-4. PETITIONER WAS NOT DENIED THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESS FERNALD.

The petitioner asserts that the failure to allow cross-examination of Fernald on the location of some stolen equipment deprived him of the right to confrontation. Two questions on this point were excluded: (1) the present location of the light fixtures (Tr. 164-165) and (2) the

present location of stolen electric screwdrivers (Tr. 165). Petitioner's assertion of constitutional error is meritless for several reasons. Petitioner was in fact afforded the right to conduct extensive cross-examination of Fernald (Tr. 96-142, 158-168). Secondly, the questions in issue were somewhat repetitive in that Fernald had twice testified that he himself kept the light fixtures (Tr. 154, 164). Moreover, the relevance of the present location of the equipment, even to show bias, is tenuous at best, and the exclusion of such tangential evidence certainly does not amount to constitutional error. Cf. *Davis v. Alaska*, 415 U.S. 308, 319 (1974). Finally, as the Supreme Judicial Court noted in thoroughly reviewing this issue, the questions could well have been leading to other criminal activity of the witness not protected by his transactional immunity. *Commonwealth v. Donahue*, Mass. Adv. Sh. (1976) at 802, 344 N.E. 2d at 891, Petition, Appendix A at 25-26. In these circumstances, allowing the witness to rest on the Fifth Amendment privilege was well within the trial judge's discretion.

Petitioner also claims that he was denied the right of confrontation by the exclusion of a cross-examination question concerning a telephone call from Fernald to a state police lieutenant. According to petitioner's offer of proof, Fernald was under arrest in Boston on an apparently unrelated matter when he called the state police lieutenant (Tr. 139). The lieutenant is said to have assisted Fernald in "retriev[ing] his car when he was bailed out." When first raised, the trial judge did not permit this line of questioning (Tr. 138). Later, however, defense counsel cross-examined Fernald without objection on this point (Tr. 165-166). Counsel's offer of proof was not borne out by the evidence. Fernald specifically denied that the state police or district attorney's office gave him any promises of assistance concerning a case pending against him in Boston

(Tr. 165-166). Fernald then began to explain something about the Boston case, but defense counsel dropped this line of cross-examination (Tr. 166).

When Fernald flatly denied any state police assistance on his Boston case, the defense counsel on cross-examination did not pursue or refute this denial (Tr. 165-166). When the hoped-for evidence of inducements did not materialize, counsel simply chose another line of inquiry (Tr. 166). The trial judge's initial reluctance to allow some questioning on possible inducements in the Boston case, gave way to the point where there was lengthy, almost open-ended questions by petitioner's counsel on all possible inducements (Tr. 103-104, 123, 125-127, 130-131, 158-164, 162). On these facts, there is absolutely no basis for the claim that the right of confrontation was denied.

5. PETITIONER'S CONVICTION WAS SUPPORTED BY EVIDENCE.

In Massachusetts, the elements of the crime of receiving stolen property are: (1) one must buy, receive or aid in the concealment of stolen property, (2) knowing that the property was stolen. G.L. c. 266, § 60; *Commonwealth v. Donahue*, Mass. Adv. Sh. (1976) 793, 800, 344 N.E. 2d 886, 890. Fernald testified that after Allen provided him a car, he and Gregory stole some heaters in Boston and returned to Stoughton. Some of the heaters were later delivered to petitioner's home address. Fernald testified that Allen went inside and came back out with the petitioner (Tr. 86). Fernald stated that petitioner gestured or pointed to his garage (Tr. 86, 94-95). While the petitioner stood approximately 15 to 30 feet away, Fernald unloaded the heaters into petitioner's garage (Tr. 87). Petitioner himself admitted to the state police and in trial testimony that he saw the heaters in his garage, but did not know how they got there, or how they were removed (Tr. 172-173, 228, 233-235). This evidence pro-

vided an ample basis for the jury's conclusion that petitioner received or aided in concealing the heaters knowing that they were stolen. *Commonwealth v. Ryan*, 355 Mass. 768, 247 N.E. 2d 564 (1969); *Commonwealth v. Ventola*, Mass. App. Ct. Adv. Sh. (1973) 545, 300 N.E. 2d 918, 923; *Commonwealth v. Wilbur*, 353 Mass. 376, 384-385, 231 N.E. 2d 919 (1967), *cert. den.* 390 U.S. 1010 (1968).

The claim of no evidence is without merit.

6. THE PROSECUTOR DID NOT KNOWINGLY USE FALSE TESTIMONY, AND IN ANY EVENT THERE WAS NO REASONABLE LIKELIHOOD THAT THE QUESTIONED EVIDENCE COULD HAVE AFFECTED THE JURY.

A possible implication in the cross-examination testimony of defense witness Gambrazzio (Tr. 213) and in the prosecutor's closing argument (Tr. closing argument 30) is that heaters installed in Joan Nardoizzi's house were heaters stolen by Fernald. In his second motion for a new trial, defense counsel argued that police investigators knew that these particular heaters were not stolen (Tr. M. for New Trial 7/3/75 at 9-10). This is the sole basis for the claim that the prosecutor knowingly used false testimony.

If the implication was false (and the record does not so demonstrate), there is absolutely no reason to disturb the trial judge's finding that any false impression "was without knowledge or conscious attempt" by the prosecutor to instill a false impression (R. 56). Secondly, there is simply no reasonable likelihood that a false impression about heaters in Nardoizzi's home could have affected the jury's judgment on whether or not petitioner Donahue was guilty of receiving stolen property. *United States v. Agurs*, *supra*, 44 U.S.L.W. 5013, 5015; *Giglio v. United States*, 405 U.S. 150, 154 (1972).

7-8. PETITIONER'S "COLLECTIVE IMPACT" ARGUMENTS DO
NOT ESTABLISH CONSTITUTIONAL ERROR.

The bulk of petitioner's arguments in points 7 and 8 merely repeat his arguments in points 1-6, and these arguments have been addressed individually in this brief.

Petitioner cites no authority, and the respondent is aware of no authority, for the novel proposition that the failure to indict other persons is a violation of petitioner's constitutional rights. Whether or not other persons should be indicted must depend on what individual evidence is available against each other person and on whether the prosecution of other persons would be in the overall best interest of the Commonwealth. These questions cannot be answered on the present record, and they are irrelevant to the lawful prosecution of the petitioner.

Petitioner concedes that he did not request a special accomplice instruction (Petition at 18); his first request for such an instruction is inappropriately addressed to this Court. This is an issue that should have properly been presented to the trial court and the state appellate court. A *sua sponte* accomplice instruction is not an absolute requirement of constitutional law imposed on the states by the Fourteenth Amendment. *Cf. Crawford v. United States*, 212 U.S. 183 (1909).

Conclusion.

The respondent respectfully submits that the record does not demonstrate any constitutional error and that the petition for certiorari should be denied.

Respectfully submitted,

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